IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JOSE TRUJILLO, an individual, on behalf of himself and all others similarly situated, Plaintiff, v. APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation, Defendants.	Civil Case No. 1:07-cv-04946 Hon. Matthew F. Kennelly (Oral Argument Requested)

THIRD SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT AT&T MOBILITY LLC'S MOTION TO COMPEL ARBITRATION AND DISMISS ACTION

Dated: May 19, 2008

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In accordance with the Court's May 8, 2008 order, defendant AT&T Mobility LLC ("ATTM") respectfully submits this brief and accompanying declarations to explain why ATTM's associate general counsel for litigation, Neal Berinhout, needed to correct a statement in his October 2007 declaration. As we explain in greater detail, there were two main reasons for the correction. First, when he executed his October 2007 declaration, Mr. Berinhout was under the impression that ATTM's terms of service were available in all stores at which iPhones may be purchased, but later learned that this was true only of ATTM stores, not Apple stores. Second, ATTM has discovered that Mr. Trujillo was involved with the purchase or use of ***two*** iPhones, a fact that was not discernable from Mr. Trujillo's customer records. The iPhone on which ***Mr. Trujillo*** received ATTM service was purchased from an ATTM store (not an Apple store) by Dawn Marie Trujillo; and the iPhone that Mr. Trujillo purchased at an Apple store is one that ***Ms. Trujillo activated*** on her separate, preexisting ATTM account. ATTM and its counsel did not realize until recently that there were two iPhones; we deeply regret any confusion that has resulted from this mistake. Because ATTM's terms of service were available in ATTM's store before Mr. Trujillo was presented with them while activating his iPhone, this Court should reject his argument that the hypothetical possibility of having to pay a restocking fee in order to avoid being subject to ATTM's terms and conditions renders his agreement procedurally unconscionable.

Mr. Berinhout's October 2007 and May 5, 2008 declarations. When Mr. Berinhout signed his October 2007 declaration, his understanding was that the iPhone on which Mr. Trujillo received ATTM service was purchased from an ATTM retail store. Third Supp. Dec. of Neal S. Berinhout ¶ 6. Mr. Berinhout's declaration, however, referred to the availability of the Terms of Service booklets in "the store," without differentiating between ATTM and Apple stores. *Id.* ¶¶ 2–3. Diane Bonina, the ATTM in-house counsel responsible for this matter, shared Mr. Berinhout's understanding that Mr. Trujillo's iPhone had been obtained from an ATTM store. Dec. of Diane Bonina ¶ 9. But on April 3, 2008, Mr. Trujillo's counsel represented that Mr. Trujillo had bought his iPhone at an Apple store and submitted an Apple store receipt to support that representation. *See* Pl. Supp. Resp. to Arb. Mot. (Dkt. No. 86), Ex. B. We accordingly assumed that ATTM's records were mistaken and that the iPhone used by Mr. Trujillo was purchased at an Apple store.

Now acting in the belief that Mr. Trujillo had purchased his iPhone at an Apple store, Mr. Berinhout sought confirmation of his original understanding that ATTM's Terms of Service booklets were available in both ATTM and Apple stores and concluded that "ATTM and Apple had adopted a joint policy that ATTM's Terms of Service booklets were to be available in * * * Apple retail stores." Third Supp. Berinhout Dec. ¶ 9. Accordingly, he concluded that the statement in his October 2007 declaration was "accurate" as to the Apple store at which Mr. Trujillo claimed to obtain his iPhone. *Id.* The Court's inquiry about this issue (*see* Order (Dkt. No. 92) 6) caused ATTM's counsel to investigate further and learn that the Apple store in Oak Brook, Illinois did not keep ATTM's Terms of Service booklets in stock. Third Supp. Berinhout Dec. ¶ 10. Mr. Berinhout thereafter made some additional inquiries and "learned that there is not a joint Apple/ATTM policy requiring that ATTM's terms of service be available in Apple retail stores" and that he had "either misunderstood the facts that had been conveyed to [him] or * * * was misinformed that this policy had in fact been implemented." *Id.* ¶ 11.

In addition, following the Court's May 8, 2008 order, ATTM investigated why its records indicated that Mr. Trujillo's iPhone had been purchased from an ATTM retail store, given that Mr. Trujillo's counsel had produced an Apple store receipt. Bonina Dec. ¶ 10. ATTM learned that the Apple store receipt actually corresponds to an iPhone that was activated by a preexisting ATTM subscriber named Dawn Marie Trujillo, who had the same billing address as Mr. Trujillo but who maintained a separate wireless account. *See* Bonina Dec. ¶¶ 10–14, 18; Dec. of Patrick Ekstrand ¶ 2. ATTM had not found this account earlier because it cannot be located by searching ATTM's records for accounts associated with Jose Trujillo. *See* Bonina Dec. ¶ 15.

ATTM also concluded that—as it had initially determined—the iPhone that Mr. Trujillo used had in fact been purchased from an ***ATTM store***. On June 29, 2007, the day of the iPhone's release (First Am. Compl. ¶ 7), Dawn Marie Trujillo went to an ATTM store in Elmhurst, Illinois to buy an iPhone; because the store had sold out of iPhones, however, she placed an order for an iPhone to be shipped to her billing address. Dec. of Ramoncito Balce ¶ 3 & Ex. 1; Bonina Dec. ¶ 27. On July 5, 2007, after that iPhone had arrived, Jose Trujillo went to the Elmhurst ATTM store, where a store employee performed the necessary credit check for Mr. Trujillo and created a "tentative" account number for him. Balce Dec. ¶¶ 6–8 & Ex. 3. That same day, Jose Trujillo activated that iPhone on his new account using iTunes. *Id.* ¶¶ 5, 9 & Exs. 2, 3.

In the meantime, on July 2, 2007, Mr. Trujillo purchased another iPhone from an Apple store in nearby Oak Brook, Illinois by using what appears to be the same MasterCard that Dawn Marie Trujillo had used to make her purchase at the ATTM store three days before. *Compare* Plt. Supp. Resp. Ex. B (Apple receipt) *with* Balce Dec. Ex. 1 (ATTM receipt). Ms. Trujillo activated that iPhone by using iTunes and added it to her preexisting ATTM account.

ATTM's terms of service were available to Mr. Trujillo before he activated his iPhone. Mr. Trujillo's purchase of an iPhone from the Oak Brook Apple store is irrelevant to his procedural unconscionability arguments because he agreed to arbitrate during the course of activating an entirely different iPhone—the one that Ms. Trujillo purchased for him from the Elmhurst

ATTM store. The circumstances surrounding that iPhone activation are the ones that are relevant to whether his arbitration agreement is procedurally unconscionable.

Either Mr. Trujillo or Ms. Trujillo would have had access to ATTM's terms of service before Mr. Trujillo was presented with and accepted them while activating his iPhone. That is more than sufficient to preclude any finding that his arbitration agreement is procedurally unconscionable under Illinois law. Even if this case were governed by *Razor v. Hyundai Motor America*, 854 N.E.2d 607 (Ill. 2006), *cert. denied*, 127 S. Ct. 1156 (2007),[1] the Illinois Supreme Court made clear in that case that presenting all contractual terms at the time of purchase "is not the only possibility" for ensuring that those contractual terms are enforceable. *Id.* at 624.

Here, before he began the activation process, Mr. Trujillo could have obtained ATTM's terms of service or learned about its arbitration provision in several ways. ***First***, a version of the terms of service that contained an arbitration provision was available on ATTM's web site. *See* Dec. of Harry Bennett (Dkt. No. 95-5) ¶¶ 4–7 & Exs. 1–3. ***Second***, because the Elmhurst store keeps ATTM's Terms of Service booklets in stock (Balce Dec. ¶ 2), Dawn Marie Trujillo could have obtained the terms for him when she ordered his iPhone on June 29, 2007. ***Third***, Jose Trujillo could have obtained a Terms of Service booklet himself on July 5, 2007 when he visited the Elmhurst store to have a store employee perform a credit check and open his account.

Fourth, Jose Trujillo had the opportunity to learn about ATTM's terms of service and its arbitration provision from Dawn Marie Trujillo's experiences as an account holder.[2] Jose

[1] As we have explained, *Razor* is distinguishable, and Mr. Trujillo's arbitration agreement would be enforceable even if the arbitration provision had not been available to him until he activated his iPhone. *See* Second Supp. Br. (Dkt. No. 98) 2–4.

[2] When Ms. Trujillo first activated service in November 2005, she would have received an ATTM Terms of Service booklet that contained an arbitration provision. Bonina Dec. ¶¶ 16–17 & Ex. 4 at 10–12. Moreover, ATTM enclosed a copy of its revised arbitration provision with her December 2006 bill and included reminders of the new provision (and how to view the provision

Trujillo and Dawn Marie Trujillo appear to live together, as ATTM's records reflect that they share the same billing address. *See* pages 2–3, *supra*. And they appear to share their finances, as they apparently used the same credit card to purchase the iPhones they gave one another.

Under Illinois law, a party who had the opportunity to read a previous contract cannot argue that he is surprised by any identical provisions in a subsequent contract. Judge Leinenweber recently held that a DirecTV customer's agreement to arbitrate was not procedurally unconscionable in part because "he was already a DirecTV customer at the time, [and therefore] presumably he had in his possession the May 1, 2006 Customer Agreement containing the arbitration provision in dispute." *Harris v. DirecTV Group, Inc.*, 2008 WL 342973, at *4 (N.D. Ill. Feb. 5, 2008). The Illinois Appellate Court reached a similar conclusion in *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 882 N.E.2d 157 (2008). There, a salesman for an auto dealer had insisted that a customer return to the dealership and sign a new purchase order that required her to pay an additional $1,700. *Id.* at 164–65. The court held that the arbitration provision in the second purchase order was not procedurally unconscionable, explaining that "[a]lthough plaintiff did not have an opportunity to read the back side" of the second purchase order when she signed it, "its preprinted terms had been in her possession for several days, because the forms for the First and Second Buyers Orders were identical." *Id.* at 176; *cf. Bunge Corp. v. Williams*, 359 N.E.2d 844, 847 (Ill. App. Ct. 1977) (defendants' assertion that they did not read the arbitration provisions in their contracts was "to no avail" because "each defendant had been a party to a contract to sell grain to [the plaintiff] on at least one prior occasion, and * * * those contracts had been made on identical forms containing identical arbitration provisions"). Given the close connection between Jose and Dawn Marie Trujillo, the logic of *Tortoriello*, *Harris*, and *Bunge* applies here.

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online) on her December 2006 through March 2007 bills. *Id.* ¶¶ 21–22 & Exs. 6, 7.

Dated: May 19, 2008

Respectfully submitted,

/s Archis A. Parasharami_______

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CERTIFICATE OF SERVICE

I certify that on May 19, 2008, I caused the foregoing Third Supplemental Brief In Support Of Defendant AT&T Mobility LLC's Motion To Compel Arbitration And Dismiss Action to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF.

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